United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

May 30, 1975

Honorable Claiborne Pell
Chairman, Subcommittee on Oceans
and International Environment
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I have been informed that at a hearing of the Subcommittee on Oceans and International Environment held on Friday, May 23, which I did not attend, you requested that I submit a statement for the record of that hearing indicating my views on the negotiating problems in Committee I at the Law of the Sea Conference and the highlights of the Geneva session.

I have attached to this letter such a statement for inclusion in the record of the hearing. I hope this statement will prove useful in the continuing assessment and analysis by the Senate Foreign Relations Committee of the ongoing negotiations on the law of the sea.

Sincerely yours,

Leigh Ratiner
Administrator
Ocean Mining Administration

Atchmt

STATEMENT OF LEIGH S. RATINER
ADMINISTRATOR, OCEAN MINING ADMINISTRATION
DEPARTMENT OF THE INTERIOR
FOR THE
SENATE FOREIGN RELATIONS COMMITTEE
SUBCOMMITTEE ON OCEANS AND INTERNATIONAL ENVIRONMENT

This statement is provided in response to the Chairman's request for my views on the negotiating problems and highlights of the work in Committee I during the Geneva Session of the Law of the Sea Conference.

The Geneva Session differed from previous sessions of the Conference in that Committee I engaged in wide-ranging discussions and negotiations on all of the subjects and issues within its mandate -- the legal regime for the international seabed area, the international machinery to be established and the basic conditions of exploration and exploitation which would be annexed to the treaty. The basic conditions would describe the fundamental procedures for acquiring exploitation rights and would provide precise guidelines and objective criteria for the International Seabed Authority to use in developing its detailed rules and regulations.

Most of the work of Committee I during the Geneva Session was carried out in the Committee I "Working Group of 50" under the chairmanship of Dr. Christopher Pinto of Sri Lanka, or in private and small group negotiations conducted by Dr. Pinto. The mandate of this "Working Group of 50," which was established toward the end of the 1974 Caracas Session by Committee I, was the

preparation of treaty articles on the legal regime with particular emphasis on the system of exploration and exploitation and the basic conditions of exploration and exploitation which would be annexed to the treaty. In Geneva, Committee I itself met infrequently but did devote three of its sessions to general statements of delegation views on the structure, powers and functions of the international machinery to be established -- a subject which had been lying dormant in Committee I since 1973.

Most of the public discussion in the Working Group of 50 was directed at elaborating a compromise system of exploration and exploitation which would accommodate on the one hand the interests of the industrialized countries in obtaining secure guaranteed access to the resources of the seabed and the interests of developing countries on the other in obtaining maximum participation in the benefits of seabed mining and in the establishment of an International Seabed Authority which would exercise "direct and effective control" over all seabed mining activities. The compromise approach which seemed to command the widest support was the contractual joint venture arrangement. After a few weeks, however, the developing countries, which, it will be recalled, traditionally act in concert in Committee I through a Group of 77 spokesman, became concerned at the amount of time the Working Group was devoting to the joint venture approach and began to stress

that the contractual joint venture system could only be seen as one alternative method of exploration and exploitation which would be available to the International Seabed Authority. The Authority would, in their view, also have to be empowered to employ a system of service contracts, or ultimately to dispense with all types of contractual arrangements and directly exploit the area to the exclusion of States and private entities.

The United States in a further attempt to bridge the gap between developing and developed countries proposed a system which became known as the "banking system" pursuant to which 50 percent of the International Seabed Area would be reserved to the International Seabed Authority for joint venture contracts in which the financial terms and technology transfer provisions would be freely negotiated. The other 50 percent of the Area would also be the subject of joint venture contracts, but these latter contracts would be issued on a relatively automatic basis and would not be subject to negotiation. Rather, the basic terms and conditions -- particularly the financial provisions -- would be clearly established in the treaty itself, and any applicant for a joint venture contract who qualified in accordance with treaty

standards would be entitled to obtain a contract. The Soviet Union proposed a variation of the banking system in which a portion of the seabed would be reserved exclusively for States and the balance could be used by the International Seabed Authority with virtually unlimited discretion, including the possibility of direct exploitation.

The Chairman of the Working Group of 50 attempted to reflect the U.S. and Soviet proposals in a draft of basic conditions of exploration and exploitation, but he took considerable liberties with the United States proposal for a banking system. Thus, in his draft, the banking system would provide for quasi-automatic joint venture contracts for the non-banked areas and complete discretion in the Authority for the areas which were assigned to the bank. Moreover, the original United States proposal limited the amount of area which could be banked by the Authority to the identical amount under contract in the non-banked areas at all times. However, under the Working Group Chairman's version, one-half of the areas which were not in the bank would be relinquished once commercial production began on a particular site. This relinquished area would also be put in the Authority's bank, thus ultimately providing for 75 percent of the area to be held in the bank by the Authority.

The developing countries, after a week of internal debate in the Group of 77, rejected both the U.S. and Soviet proposals. In doing so, they also rejected the Working Group Chairman's version of the U.S. proposal which, of course, was considerably more favorable to their position than was the original U.S. proposal. The principal reason they gave for rejecting the proposal was that it split the common heritage of mankind into two kinds of legal regimes and this split was considered to be politically unaccceptable and economically unattractive in comparison to the original Group of 77 proposals on this subject.

These draft basic conditions, which left a great deal to be desired from the point of view of the United States and other industrialized countries, were almost rejected (even as a basis for negotiation) by the Group of 77. Influential members of the Group of 77 were arguing for a return to the Group's Caracas position which we considered to be non-negotiable. However, instead of rejecting the Chairman's draft, the Group of 77 insisted that the U.S. and Soviet ideas be deleted and that certain other changes be made to conform the draft to the Group of 77 position in its purest form. A revised draft was prepared by him, which appears as Annex 1 to the single negotiating text. In its present form, it cannot be considered as a basis for negotiation, and the United States so stated in the Working Group when the paper was introduced. We also made it clear that we could in no way be associated with the development of that paper in its current form.

Part of the underlying thinking of the developing countries appears to contemplate willingness to compromise on the structure, powers, functions and voting mechanisms of the International Seabed Authority. This willingness, however, is coupled with adamant insistence that the Authority have the ultimate power to decide the system of exploration and exploitation, including whether, if at all, to grant any contracts to States and private companies. Thus, in producing a draft of basic conditions that was heavily oriented towards the positions of the developing countries, Chairman Pinto may have been assuming that these basic conditions would ultimately be attached as an Annex to a draft treaty which would in many other important respects be oriented towards the positions of the industrialized countries. As I will explain this expectation did not materialize.

Midway in the Geneva Session, the Plenary organ of the Conference decided to request the Chairmen of the three main Committees to prepare single negotiating texts. The Chairman of Committee I, Paul Engo of the Cameroon, requested the Secretary of the Committee and its rapporteur to prepare a first draft of the single text. In view of Dr. Pinto's long association with the day-to-day work and

negotiations in Committee I, he was asked to prepare this draft with the approval of the Chairman of Committee I.

The Working Group Chairman Pinto produced a first draft designed to reflect the developing countries' position on virtually all subjects in Committee I. With this draft as a starting point and, satisfied that the draft met Group of 77 objectives, he then embarked on the preparation of a second draft which would balance the first draft to take into account the interests and needs of the developed countries. In this process, he engaged in intense consultations with a number of delegations representing the widest possible spectrum of views in Committee I and representing both developed and developing countries.

As Pinto's work progressed, Mr. Engo began a more formal series of consultations with interested delegations to hear their views. Given the short deadline which had been imposed by the Plenary for the submission of his text, he set a final date of May 2 for concluding these consultations. Because of this time pressure, it was apparently not possible for Mr. Engo to incorporate into his own draft the substance of the revised Pinto text which reached him on Saturday, May 3, a full day beyond the deadline Mr. Engo had set for concluding his consultations and receiving written proposals. Although the delay was necessary to permit Mr. Pinto time to carry out last minute consultations, it is one of the ironies of a large multilateral conference such as this that even a short delay for a paper of considerable potential importance could

not have been permitted if work was to proceed in an orderly and timely manner.

Thus, the second text prepared by the Working Group Chairman Pinto never became an official document of the Conference though it was rather widely distributed on an informal basis to most delegations. It is reasonable to believe that in light of the intense "shuttle diplomacy" carried out during the preparation of that text that it may give a clearer indication of the state of negotiations than does the official single negotiating text.

It should be stressed that, from the point of view of the United States, neither of these two texts would be acceptable, although in most respects the text which benefitted from intensive behind-the-scenes consultations comes much closer to the mark. The principal difficulties with the Pinto text are that it provides for excessive policy-making power in the one nation, one vote Assembly of the International Seabed Authority and that it provides for a system of exploration and exploitation which is at total variance with the position of the industrialized countries. It does, however, attempt to provide for a distribution of the Authority's powers and functions and a structure and voting mechanisms which approach the stated objectives of many industrialized countries, including the United States. The Engo text,

on the other hand, also adopts the developing country approach to the system of exploration and exploitation elaborated in Annex 1, but is less attractive from the United States perspective on questions involving the powers and functions, structure and voting mechanisms in the International Seabed Authority. For example, on one of the key areas of concern to the United States -- composition of the Council, its voting arrangements and its powers and functions, the Pinto text comes substantially closer to accommodating United States proposals than the Engo text.

Another area of considerable importance to the United States has been the establishment of a Tribunal with compulsory dispute settlement procedures. The Pinto text provides for a dispute settlement system which approximates U.S. objectives; the Engo text is very far removed from an acceptable dispute settlement system. There are, however, a variety of important differences between the two texts, and in a few areas we might prefer the Engo formulation. It remains to be seen the extent to which a new negotiating text can now be prepared which reflects the possible

emerging consensus in Committee I on the question of the powers and structure of the International Seabed Authority.

It can fairly be said that behind the scenes in Committee I there was substantial progress on the powers and functions of the new International Seabed Authority. For the reasons explained above, this progress is not apparent from reading the Engo text in isolation. Much insight can be gained from reading the Pinto text together with the Engo text. However, despite meaningful progress on the International Seabed Authority, in respect of the system of exploration and exploitation, there was no progress in Committee I. It may be, however, that on this vital issue, the Group of 77 considered compromise to be premature in light of the widely held view that at least one, and possibly two, additional sessions of the Conference were still ahead of us.

In view of the present stage of work in the Committee it seems clear that at least one more session of the Conference will probably be necessary to obtain a balanced single negotiating text -- a text which resolves most issues and leaves aside only a limited and manageable number of issues for further negotiation. It is possible that at a second session in 1976 final negotiations could occur on a Committee I text, although it does not seem probable. It is more probable that a Committee I text could emerge in 1977 if the political

will exists in the Group of 77 to compromise on the system of exploration and exploitation.

Taking into account the sum total of activities in Committee I as reflected mainly in the May 3 Pinto text, the following major issues would appear to be moving ahead in a constructive manner:

First, there appears to be widespread understanding and support for the idea that a mechanism must be found for ensuring the earliest possible entry into force of the treaty when it is completed, so that ocean mining can commence without delay;

Second, there appears to be growing understanding and sympathetic support for provisions which would protect the investments of companies which have already been made in ocean mining;

Third, there is general recognition that the powers and functions of the International Seabed Authority should be limited to regulation and management of resource-related activities and should not extend to other unrelated activities or to the superjacent waters.

Fourth, there appears to be widespread support for the creation of a Tribunal for the deep seabed with the power to settle all disputes relating to activities of the exploration and exploitation of the resources of the Area at the instance of any party to a contract or any State party to the treaty.

Fifth, there is substantial support for the idea that the basic policy of the International Seabed Authority concerning exploration and exploitation should be developed in the Council and not in the Assembly -- though there is still a wide difference of opinion on the overall and general policy-making powers of the Assembly. It should also be noted that there is support for the idea that the Council could be composed in such a way as to ensure adequate representation of highly industrialized countries and voting mechanisms which would provide protection for their interests;

Sixth, there is recognition that the Assembly should be limited so as to avoid or minimize the chances of "runaway" political decisions.

Seventh, it is generally accepted by developing countries that land-based producers should have an opportunity for a hearing and that the International Seabed Authority should be empowered to deal with the problems of land-based producers. On the other hand,

the developing countries do not appear to object to placing the burden of proof on the land-based producers and to circumscribing the decision-making process in such a way that decisions of the International Seabed Authority which could involve adverse economic implications for investors or investing countries would be very difficult to adopt.

Eighth, there is increasing awareness in the Group of 77 that, even if the Authority were empowered directly to exploit the Area through an organ known as the "Enterprise," the Enterprise would be subject to regulation by technical organs of the Authority and could not take action without the approval of the Council.

Ninth, there is widespread support for guaranteeing in the treaty the security of tenure of operators who are granted contractual rights by the Authority.

While I have just summarized areas of potential compromise, I must candidly present to you a summary of areas where serious negotiating difficulties lie ahead of us. These areas of difficulty and my personal assessment of the underlying reasons for them are as follows:

1. The developing countries presently hold intransigent views on the question whether the International Seabed Authority should be empowered to exploit the whole of the "Area" to the exclusion, if the Authority so decides, of States and private companies. They say it must have this power; we say no;

2. They hold with almost equal vigor the view that ultimately the decisions, policies and actions of the Authority must be subordinated to a one nation, one vote Assembly; we do not and cannot agree;

3. They insist that even if the Authority exploits the Area in a contractual mode, it must be almost entirely free to dictate the terms and conditions of contracts -- particularly those relating to technology transfer and profits. To ensure a strong bargaining position in such contractual negotiations they insist that the Authority must have the right to keep the Area closed to exploitation until the Authority decides to open it;

4. They believe that the foregoing three points are the minimum they must have in Committee I to ensure their control over the raw materials of the seabed -- a foreign policy objective of many if not most developing countries in the world today. This policy is pursued actively in every international forum to which they have access and is

usually characterized as the creation of a new economic order.

5. They believe this position is equitable, particularly for the United States, because American companies with know how, technology and capital and a history of successful foreign investment will be the likely beneficiaries of the Authority's decisions and policies.

Regardless of the correctness of their assumptions the foregoing views are strongly held by virtually all developing country delegations and this common conceptual bond is what holds the Group of 77 together.

Committee I is a manifestation of political and economic difficulties which are being faced by developed and developing countries in all areas of raw materials production and consumption. The developing countries in many different forums

are making a concerted thrust to acquire collective control over raw materials as a means to improve their economic well being and acquire increased political power. They view their position on these matters as revolutionary, as can be seen from Mr. Engo's written statement introducing his single negotiating text. Industrialized countries, on the other hand, are acutely aware of their dependence on raw materials supply and cannot be expected to agree that -- in an area comprising two-thirds of the earth's surface which is now available for exploration and exploitation under existing international law -- they will surrender rights of access to the abundant raw materials of the seabed by agreeing to a system in which an international authority could limit or exclude their access. For this reason it is difficult to predict that in the near future these problems can be overcome. These, in a sense, are not negotiating problems. On all areas where compromise was desired by developed and developing countries alike, compromise began to emerge. In respect of this intensely politico-economic issue -- whether the International Seabed Authority will have total control over access to the raw materials of the seabed and the amount of production which will come from the seabed -- there has been

no willingness yet on the part of the developing countries to find a compromise. The United States banking system was a serious effort to bridge this gap and find a compromise and perhaps it will be reconsidered at future sessions of the Conference.

Finally, I would like to emphasize that while it no longer seems possible to predict a speedy conclusion of the Conference, even in Committee I where the political difficulties are the greatest, important, although still insufficient, progress was made in Geneva and further progress might be achieved at future sessions of the Conference. Such negotiations, however, can only lead to a successful convention if they occur in the context of developing country willingness to seek solutions which do not jeopardize the interests of the industrialized countries in securing long-term stable supplies of minerals from the deep seabed and, on the part of industrialized countries, a willingness to probe for solutions to the problems which have troubled developing countries for a long time in respect of the development and use of raw materials.